Supreme Court, U. S.
FILED
DEC 17 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief for the States of California, Alabama, Arizona, Colorado, Connecticut, Indiana, Kansas, Louisiana, Maryland, Missouri, New Jersey, New Mexico, New York, North Carolina, Oregon, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin as Amici Curiae

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INTEREST OF AMICI CURIAE

The signatory states respectfully submit this brief *amici curiae* pursuant to Supreme Court Rule 42(4).

Within our federal system, the States play an important role in antitrust enforcement. In their proprietary capacities, for example, the *amici* States purchase a wide range of goods and products. In 1973 alone, the 50 States and their political subdivisions spent approximately $75.7 billion for goods and services. Council of State Governments, State and Local Purchasing 1.1 (1975). As the actual users of these goods and services, the *amici* ultimately bear most —if not all—of the burden of any unlawful overcharges which are imposed in the chain of distribution. To vindicate their interests as actual users of over-priced goods and services and to enforce state and federal antitrust laws, the States have vigorously prosecuted antitrust damage actions, including actions in the following industries: ampicillin, asphalt, automobile fleet sales, brass mill tubing, bread, cast iron pipe, cement, children's books, gypsum wallboard, master key systems, milk, plumbing fixtures, sugar, and tetracycline. *See* National Association of Attorneys General, State Antitrust Laws and Their Enforcement 4 (1974).

In addition, Congress has assigned to the States considerable responsibilities for enforcement of the federal antitrust laws. In the Crime Control Act of 1976, Pub. L. No. 94-503, section 116 (Oct. 15, 1976), for example, Congress authorized appropriations of $10 million per year for antitrust enforcement by State Attorneys General. Further, Congress has empowered State Attorneys General to sue as parens patriae to recover damages for violations of the Sherman Act on behalf of citizens of the respective States. 15 U.S.C. § 15c.

Accordingly, the *amici* States have direct and substantial interests in both their proprietary and sovereign capacities in their ability to obtain legal redress for injuries they and their citizens suffer by reason of antitrust violations.

QUESTIONS PRESENTED

1. When sellers of commodities are subject to liability under Robinson-Patman Act section 2(a), is a price information exchange agreement, in violation of Section 1 of the Sherman Act, necessary to establish a Robinson-Patman section 2(b) meeting-competition defense?

2. When competitors have agreed to exchange current price quotations to specific customers, in violation of Section 1 of the Sherman Act, can they defend their actions by claiming to have undertaken the agreement to establish the meeting-competition defense in Robinson-Patman Act section 2(b), without showing that they were genuinely threatened with Robinson-Patman section 2(a) liability?

STATEMENT OF CASE

Respondents are corporations which manufacture, sell, and distribute gypsum board products, and their corporate officials. All were indicted in 1973 for violations of Section 1 of the Sherman Act (15 U.S.C. sec. 1), involving a conspiracy starting before 1960 and continuing until the indictment. At trial, the jury returned verdicts of guilty. *United States v. United States Gypsum Co.* (3d Cir. 1977) 550 F.2d 115, 117-118.

The gypsum industry is highly concentrated. During the period of the conspiracy, respondent corporations were responsible for 75% of all national sales. Eight leading firms made 95% of all national sales. *Id.* at 117.

Price generally determines a buyer's choice of the brand of gypsum board to purchase. Gypsum is a standardized, homogeneous product; there are no significant differences among the standard types of board. Buyers are construction contractors, presumably aware of these facts. Consequently, competition is usually manifested in the discounts and changes in credit terms offered by the manufacturers. *Id.* at 117.

Total demand for gypsum board is inelastic with respect to price. It is determined by the total amount of construction undertaken. *Id.* at 117. During the 1960's, particularly the latter part of the decade, there was rising capacity in the industry but a slowing growth in demand. *Wall Products Co. v. National Gypsum Co.* (N.D. Cal. 1971) 326 F.Supp. 295, 301-304. Thus, the time period of the conspiracy was generally characterized by overcapacity in the industry. (See Petition for Writ of Certiorari of petitioner United States at fn. 4.)

Respondents were shown to have participated in a mutual price verification scheme, whereby a manufacturer would telephone one of its competitiors to inquire about the price the latter had offered a specific customer. The trial court instructed the jury that this practice constituted an agreement to raise, fix, maintain, and stabilize prices if it had those effects upon prices. So instructed, the jury returned verdicts of guilty. *United States v. United States Gypsum Co., supra,* 550 F.2d at 120.

On appeal, respondents claim that they should have been granted immunity from Sherman Act section 1 liability.

They point to Robinson-Patman Act section 2(a) (15 U.S.C. sec. 13(a)), which forbids anticompetitive price discrimination, and to section 2(b) of the same Act (15 U.S.C. sec. 13(b)), which allows a complete defense for meeting the price of a competitor. Respondents maintain that they undertook the price verification agreement to build a Section 2(b) defense by determining their competitors' exact prices, and that they therefore should be excused from Sherman Act requirements. *Id.* at 120-121. Accepting the legal arguments of respondents, the Court of Appeals reversed. *Id.* at 127.

SUMMARY OF ARGUMENT

The facts of this case demonstrate, and the jury below found, that respondents violated Sherman Act section 1. They agreed to exchange price information concerning specific customers and, in so doing, stabilized prices. What respondents accomplished was to tame the naturally competitive nature of their industry in an oversupply situation. This type of agreement, with this stabilizing effect, is a clear violation of law.

The Court of Appeals' basic error is that it reads the Robinson-Patman Act (which forbids price discriminations that harm competition) as an anticompetitive restriction upon the Sherman Act. Actually, the purpose of both laws is to encourage competition. In particular, the Robinson-Patman Act should not be used to carve exceptions out of the Sherman Act.

Respondents seek to be excused from Sherman Act liability for their agreement to discuss prices on the ground that they were allegedly preparing a defense to possible liability for price discriminations that were illegal under Robinson-Patman Act section 2(a). Supposedly, they were seeking a

meeting-competition defense under section 2(b) of the Act. However, a section 2(b) defense does not require that a seller discuss prices with its competitors. There are numerous legitimate means for a seller to check on the prices offered by others without violating the Sherman Act. The courts have only required that sellers make a reasonable effort to determine competitive offers. A buyer who misrepresents to a seller the price offer of a competitor does not increase the seller's Robinson-Patman jeopardy; the buyer itself might be subject to liability under section 2(f) of the Act.

The Court of Appeals did not consider whether respondents were actually threatened with liability under Robinson-Patman Act section 2(a). Only an anticompetitive price discrimination is unlawful. Nothing in the Court's decision indicates that the discriminations for which prices were exchanged would have subjected respondents to Robinson-Patman liability. Hence, there is no indication that the supposed Robinson-Patman excuse for violating the Sherman Act was valid in this case.

By its decision, the Court of Appeals has seriously hampered Sherman Act enforcement. The rules it establishes are easy to circumvent. In the future, sellers desiring to enter into price exchange agreements to stabilize prices need only follow the letter of the Court's guidelines in order to fabricate for themselves a complete defense to antitrust liability.

Furthermore, the rules are impractical. Sellers who wish to comply with them will have difficulty knowing whether or not they are within the law. Sherman Act litigation will become significantly more complex as courts are forced to decide whether the rules have been followed and whether sellers in fact had bona fide Robinson-Patman problems for which to build a section 2(b) defense.

There is nothing in the Robinson-Patman Act that compelled respondents to agree to discuss prices with one another. Their actions violated the Sherman Act, and the decision of the Court of Appeals should therefore be reversed.

ARGUMENT I

The Court of Appeals Erred in Construing the Robinson-Patman Act to Limit Rather Than to Encourge Competition

A. THE SHERMAN ACT FORBIDS ANTICOMPETITIVE TAMPERING WITH THE PRICE MECHANISM.

Section 1 of the Sherman Antitrust Act (15 U.S.C. sec. 1) prohibits contracts, combinations, or conspiracies in restraint of trade or commerce. This Act makes illegal all contracts or acts which are unreasonably restrictive of competitive conditions. *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 58 [55 L.Ed. 619, 31 S.Ct. 502]. Certain combinations—in particular, price-fixing—are illegal per se. Prices are the vital part of the economy which must be protected against any degree of interference. *United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 221 [84 L.Ed. 1129, 60 S.Ct. 811].

Respondents participated in an agreement to tell one another the prices they were offering to specific customers. *United States v. United States Gypsum Co.*, 550 F.2d 115, 120. Manufacturers are under no compulsion to disclose their prices to their competitors. Yet respondents knew they could call one another freely and receive accurate price information; this circumstance clearly indicated collusion. Respondents' activity amounted to a reciprocal agreement —each manufacturer supplied information to the others, secure in its knowledge that the others would do the same for it.

Such a price exchange is a violation of Sherman Act section 1. In an industry such as gypsum manufacturing, with a few large manufacturers selling a fungible commodity to hundreds of other businessmen, price has a specially sensitive function in the antitrust equation. *United States v. Container Corporation of America* (1969) 393 U.S. 333, 340 [21 L.Ed. 2d 526, 89 S.Ct. 510] (concurring opinion of Justice Fortas).

Oversupply conditions in an industry such as gypsum (or corrugated containers as in *Container, supra,* 393 U.S. 333) permit buyers to seek and receive lower prices. Common sense indicates that an agreement among manufacturers to exchange prices offered to specific customers undermines the customer's buying position. Ordinarily, buyers can force manufacturers to compete on price, but verification calls have the direct effect of dampening that competition. When a manufacturer gives a competitor accurate price information, pursuant to a mutual understanding, it is limiting its own short term opportunity to make a sale, but it is protecting the industry's long run price level for all sellers, holding prices above the natural competitive level. In fact, the declining prices that respondents headed off are the free market's natural corrective mechanism for an oversupply situation.

Hence, a price exchange agreement such as that undertaken by respondents naturally leads to a stabilization of prices. *Wall Products Co. v. National Gypsum Co.* (N.D. Cal. 1971) 326 F.Supp. 295, 311; *Container Corporation, supra,* 393 U.S. 333. Sherman Act section 1 prohibits such price stabilization. *Id.* at 337.

Respondents clearly sought illegal price stabilization through their verification scheme. They worried about buyers' attempt to "whipsaw" a price cut. *United States v.*

United States Gypsum Co., supra, 550 F.2d at 121. In *Container, supra,* 393 U.S. 333, this Court properly reversed the ruling of the District Court, which would have allowed sellers to enter into a price-stabilizing information exchange agreement because buyers were giving them inaccurate information about competitors' prices. *United States v. Container Corp. of America* (N.D. N.C. 1967) 273 F. Supp. 18, revd. (1969) 393 U.S. 333. What respondents are trying to avoid is normal price shopping between buyers and sellers. Negotiations of this character are the natural condition of the competitive marketplace. *Forster Manufacturing Co. v. Federal Trade Commission* (1st Cir. 1964) 335 F.2d 47, 55-56, cert. den. (1965) 380 U.S. 906 [13 L.Ed. 2d 794, 85 S.Ct. 887].

In particular, construction contracting involves intense competitive bidding. The highly competitive nature of this industry does not justify unreasonable interference with the strictures of the Sherman Act. *Christiansen v. Mechanical Contractors Bid Depository* (D. Utah 1964) 230 F.Supp. 186, 190, affd. (10th Cir. 1965) 352 F.2d 817, cert. den. (1966) 384 U.S. 918 [16 L.Ed. 2d 439, 86 S.Ct. 1365].

B. THE ROBINSON-PATMAN ACT SHOULD NOT BE USED TO DEFEAT THE PROCOMPETITIVE POLICY OF THE SHERMAN ACT.

The Court of Appeals strikes an improper balance between the Sherman Act and the Robinson-Patman Act (15 U.S.C. § 13). It approves an otherwise clear violation of the Sherman Act to accommodate a single defense under Robinson-Patman, without any showing that respondents were in jeopardy of liability under the latter statute. Even assuming that some conflict between the laws is present, the accommodation devised by the Court of Appeals is impermissible.

In enacting the Sherman Act and the Robinson-Patman Act, Congress sought to protect competition and to prevent monopoly. Specifically, Congress did not intend for the Robinson-Patman Act to abolish competition or radically to curtail it. *Standard Oil Co. v. Federal Trade Commission* (1951) 340 U.S. 231, 248-249 [95 L.Ed. 239, 71 S.Ct. 240]. As the Court of Appeals correctly noted, in the event of a conflict, the Robinson-Patman Act should not be allowed to invalidate the requirements of the Sherman Act. *United States v. United States Gypsum Co., supra,* 550 F.2d at 125; *Automatic Canteen Co. v. Federal Trade Commission* (1953) 346 U.S. 61, 69 [97 L.Ed. 1470, 73 S.Ct. 998]. With respect to Sherman Act section 1, there is a heavy presumption against implicit exemptions. *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 787 [44 L.Ed. 2d 572, 95 S.Ct. 2004].

The Court of Appeals reads *United States v. Container Corp. of America, supra,* 393 U.S. at 335, to allow a Robinson-Patman exception to the Sherman Act, because that case distinguished "the controlling circumstance" present in *Cement Manufacturers' Protective Association v. United States* (1925) 268 U.S. 588 [69 L.Ed. 1104, 45 S.Ct. 586]. The controlling circumstance present there was that buyers would have perpetrated unlawful fraud upon the sellers, under existing contracts, if sellers had not been allowed to exchange information. This surely is a far more compelling justification for limiting the Sherman Act than that advanced here by respondents. The circumstance found by the Court of Appeals in this case, the supposed need to perfect a Robinson-Patman defense, is not a genuine condition of the industry. Rather, the Court below merely wanted to accommodate the new judicially-created rule that sellers must discuss prices to build a Robinson-Patman defense. *Container* indicates that *Cement Manufacturers* is a solitary exception to Sherman Act liability based upon unique facts. Nothing in *Container* suggests that lower courts are free to find "controlling circumstance" exceptions to the Sherman Act in other situations.

Nor does the recent case of *United States v. Citizens & Southern National Bank* (1975) 422 U.S. 86 [45 L.Ed. 2d 41, 95 S.Ct. 2099], suggest that the Sherman Act can be limited as the Court of Appeals would do here. In that case, this Court found that certain Georgia banks had not violated the Sherman Act in exchanging interest information. This conclusion was reached in light of the peculiar facts involved. The banks were *de facto* branches, established to avoid Georgia's laws against branch banking, and since the "branching" combination was permissible under the Sherman Act, so was the information exchange. The Court noted that this was different from the situation of "independent contractors having no permissible reason for intimate and continuous cooperation and consulation." *Id.* at 113. Here, the Court of Appeals suggests that the Robinson-Patman Act justifies respondents' sharing of prices; in fact, the procompetitive policy of that law is diametrically opposed to sellers acting in combination rather than as completely independent competitors.

ARGUMENT II

The Court of Appeals Created a Wholly Unnecessary Exception to Sherman Act Requirements

A. THE ROBINSON-PATMAN ACT DOES NOT REQUIRE COMPETITORS TO DISCUSS PRICES IN ORDER TO ESTABLISH A SECTION 2(b) DEFENSE.

Certain price discriminations are unlawful under Robinson-Patman Act section 2(a). (15 U.S.C. sec. 13(a)). However, section 2(b) of the Act (15 U.S.C. sec. 13(b)) provides a complete defense to a charge of price discrimination if

the seller is in good faith meeting an equally low price of a competitor. *Standard Oil Co. v. Federal Trade Commission, supra,* (1951) 340 U.S. 231.

The Court of Appeals erred in holding that respondents needed to discuss prices with one another in order to establish a Robinson-Patman section 2(b) defense. The actual standard set up by this Court for section 2(b) is simply that the seller must show the existence of facts which would lead a reasonable and prudent person to believe that the lower price offered would meet an equally low price of a competitor. *Federal Trade Commission v. A. E. Staley Manufacturing Company* (1945) 324 U.S. 746, 759-760 [89 L.Ed. 1338, 65 S.Ct. 971]. Sellers can establish such facts by numerous legitimate means.[1]

Respondents are experienced in the industry and are not ignorant of the general business practices of their competitors and their buyers. They can observe the market prices at which their buyers resell gypsum to determine whether other manufacturers are actually cutting prices. As a matter of responsible business judgment, a seller

1. Robert W. Steele in *Section 2(b) of the Robinson-Patman Act —Rules For Meeting Competition in the Past and Present* (1968) 13 Antitrust Bulletin 1223, indicates some of the information that sellers legitimately can use and have used to establish a defense: (1) Invoices and billings to a buyer; (2) Written competitive quotations; (3) Price lists; (4) Competitors' price policies published generally in the trade; (5) Written statements by buyers describing specific competitive offers; (6) Written statements by buyers generally describing competitive offers; (7) Written reports of sellers' representatives describing competitive offers; (8) Oral statements of buyers about specific competitive offers; (9) Oral statements of buyers about unspecified competitive offers; (10) Previous knowledge of customers' general buying policy; and (11) General knowledge of the trade. Mr. Steele concludes that the 2(b) defense does not lend itself to hard and fast rules, that guidelines are apparent from the cases, and that these guidelines appear to place only reasonable burdens on businessmen. *Id.* at 1269.

would not grant a price preference before ascertaining facts that indicate that the preference is competitive. This Court should not require sellers to breach the Sherman Act in doing so.

Even though the Sherman Act forbids competitors' agreements to discuss current prices, Robinson-Patman Act section 2(b) simply does not place insurmountable obstacles before a seller wishing to establish a meeting-competition defense. Recognizing the difficulties faced by a seller trying to verify a competitor's price, courts have been careful to impose only reasonable requirements for price checking. See, e.g., *Kroger Co. v. Federal Trade Commission* (6th Cir. 1971) 438 F.2d 1372, cert. den. (1971) 404 U.S. 871 [30 L.Ed. 2d 115, 92 S.Ct. 59], aff'g *Beatrice Foods Co. and the Kroger Co., Inc.* (1969) 76 FTC 719 [Dkt. 8663 [1967-70 Transfer Binder] Trade Reg. Rep. (CCH) ¶19,045]; *Jones v. Borden Co.* (5th Cir. 1970) 430 F.2d 568; *Callaway Mills v. Federal Trade Commission* (5th Cir. 1966) 362 F.2d 435; *Forster Mfg. Co. v. Federal Trade Commission, supra,* 335 F.2d 47. In particular, these cases do not require sellers to know exactly what their competitors are charging.

The Court of Appeals read its own decision in *Viviano Macaroni Co. v. Federal Trade Commission* (3d Cir. 1969) 411 F.2d 255, to require a seller to discuss price with its competitors to insure a section 2(b) defense. In that case, the seller failed to show good faith because it did not take any legitimate steps to determine whether the other offers were genuine, did not repeat its initial inquiry even though it continued the discrimination for three years, did not know who its competitors were or what they had offered, and did not even know how much of a price break it had extended to "meet competition." Nothing in the case sug-

gests that the seller should have talked price with its competitors. Even assuming that this is a proper reading of the case, the Court of Appeals should have overruled its own interpretation of the Robinson-Patman Act rather than this Court's interpretation of the Sherman Act.

The Court of Appeals appears to be inordinately concerned with the problem of the "lying buyer," who does not accurately report to a seller the prices offered by the seller's competitors in order to induce the seller to lower its prices. As a business matter, this is a normal condition of participation in a competitive market that is regulated by the economic laws of supply and demand and need not concern the Court in this case.[2] In times of oversupply, buyers tend to dictate prices, and the so-called "lying buyer" can get price concessions. In times of short supply, the sellers dictate prices and the "lying buyer" is not a problem.

As a legal matter, sellers should not be allowed to agree to exchange price information solely because they claim to distrust the buyers' veracity. The Court of Appeals appears to worry that a seller's section 2(b) defense will be defeated if the buyer is lying about the competitive offer. However, a more rational approach to the Robinson-Patman Act places the liability for an illegal discrimination upon the party responsible for the offense, whether buyer or seller. The legislative setting of the Act indicates that Congress recognized the need to charge buyers with responsibility comparable, so far as possible, to that placed

2. To preserve aggressive bargaining, the Federal Trade Commission has recently refused to impose upon buyers, under Federal Trade Commission Act section 5 (15 U.S.C. § 45), an affirmative duty to disclose competitive offers. *The Great Atlantic and Pacific Tea Company* (1976) 87 FTC 962, 1049-51 [Dkt. 8866 [1973-76 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,150], aff'd. *The Great Atlantic and Pacific Tea Co. v. Federal Trade Commission* (2d Cir. 1977) 557 F.2d 971.

on sellers. *Automatic Canteen Co. v. Federal Trade Commission, supra,* 346 U.S. at 70.

The Federal Trade Commission's decision in *Beatrice Foods Co., supra,* 76 FTC 719, illustrates the proper approach to this problem. The seller tried by all legitimate means to find what its competitors were charging. *Id.* at 809-810. But the buyer, Kroger, falsely communicated the impression that other sellers were making lower offers. *Id.* at 819. Consequently, the seller was held to have been meeting competition in good faith, and section 2(b) provided a complete defense. Kroger, on the other hand, was found to have violated Robinson-Patman Act section 2(f) (15 U.S.C. sec. 13(f)), which forbids a buyer from knowingly inducing or receiving an illegal discriminatory price.[3]

The cases indicate that sellers need not agree to discuss prices with competitors to establish a Robinson-Patman Act section 2(b) defense. If the seller responsibly assesses the market using the facts legitimately available to it, it will have no trouble complying with section 2(b) standards. This Court should take the opportunity afforded by the present case to re-affirm the principle that such a price-exchange agreement is forbidden by the Sherman Act, since it is not a necessary part of a Robinson-Patman Act defense.

3. Section 2(f) requires a *knowing* inducement, but a seller who is concerned about a buyer's honesty in reporting a competitive offer can always inform the buyer that the discrimination is suspect under Robinson-Patman and that a misrepresentation by the buyer might result in section 2(f) liability. *The Great Atlantic and Pacific Tea Company, supra,* 87 FTC at 1060. Of course, the seller is still obligated to make a reasonable inquiry into the facts surrounding the supposed competitive offers. *Id.* at fn. 19. Congress intended that § 2(f) be used in this manner to prevent undue buyer pressure. *Automatic Canteen Co. v. Federal Trade Commission, supra,* 346 U.S. at 73.

B. RESPONDENTS SHOULD NOT BE ALLOWED TO CLAIM A ROBINSON-PATMAN ACT IMMUNITY FROM THE SHERMAN ACT WITHOUT FIRST DEMONSTRATING A REALISTIC THREAT OF ROBINSON-PATMAN LIABILITY.

The jury instructions laid down by the Court of Appeals for consideration of a Robinson-Patman Act exception to Sherman Act liability would not require a finding that defendants were actually threatened with liability under Robinson-Patman Act Section 2(a). In effect, the Court of Appeals instructs the trial court to accept respondents' self-serving assertion that they exchanged prices among themselves solely to avoid liability under Robinson-Patman. The Court does not require the necessary finding that respondents' alleged concern with the Act was valid. See *Bruce's Juices, Inc. v. American Can Co.* (1947) 330 U.S. 743, 745 [91 L.Ed. 1219, 67 S.Ct. 1015]. It completely fails to analyze the type of activity the Act is intended to prevent.

Robinson-Patman Act section 2(a) prohibits price discrimination "where the effect of such may be substantially to lessen competition or tend to create a monopoly . . . or to injure, destroy, or prevent competition . . ." 15 U.S.C. section 13(a). Unless this condition is met, the discrimination is lawful. *Federal Trade Commission v. Borden Company* (1966) 383 U.S. 637, 643 [16 L.Ed. 2d 153, 86 S.Ct. 1092]. The Court of Appeals did not pause to consider whether the discriminations that allegedly motivated respondents to agree to talk prices with their competitors actually threatened substantial injury to competition, so as to fall within the provisions of the Act. If this Court does create a Robinson-Patman exception to the Sherman Act, defendants should bear the burden of proving this essential element of their defense. See *Citizen Publishing Co. v. United States* (1969) 394 U.S. 131 [22 L.Ed. 2d 148, 89 S.Ct. 927].

In reality, the circumstances of this case indicate that respondents' supposed Robinson-Patman concerns were illusory. The fluid market conditions of the gypsum industry, with prices constantly fluctuating as bids are accepted, should have mitigated respondents' fears about illegal price discrimination. The purpose of the Act is to keep large buyers from receiving discriminatory preferences over small ones because of the former's greater buying power (*Federal Trade Commission v. Fred Meyer, Inc.* (1968) 390 U.S. 341, 349 [19 L.Ed. 2d 1222, 88 S.Ct. 904]), not to prevent buyers from shopping for competitive price cuts from large sellers. The cases of *Viviano Macaroni Co. v. Federal Trade Commission, supra,* 411 F.2d 255, and *Kroger Co. v. Federal Trade Commission, supra,* 438 F.2d 1372, cited by the Court of Appeals as outlining the section 2(b) defense, illustrate this point.[4] The decision of the Court of Appeals in no way suggested that respondents were dicussing prices because they were worried about giving price breaks to inordinately powerful buyers.

ARGUMENT III

The Court of Appeals Established Unworkable and Impractical Rules

A. THE RULES FOR PRICE VERIFICATION ESTABLISHED BY THE COURT OF APPEALS CAN EASILY BE CIRCUMVENTED.

The Court of Appeals would allow competitors to engage in a price exchange agreement, otherwise in violation of the Sherman Act, if the following criteria were met:

1. The competitors engaged in the practice solely to comply with the strictures of the Robinson-Patman Act;

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4. The *Viviano* case involved the accommodations given to a "large buyer," *supra,* 411 F.2d at 258 and a "large customer," *Id.* at 259. In *Kroger,* the discriminatory price was granted to a grocery retailer "in a very powerful bargaining position." *Beatrice Foods Co., supra,* 76 FTC at 719.

2. They had first resorted to all other reasonable means of corroboration, without success;
3. They had good, independent reason to doubt the buyer's truthfulness; and
4. The communication with competitors was strictly limited to the one price and one buyer at issue.

United States v. United States Gypsum Co., supra, 550 F.2d at 126.

Unfortunately, the rules established by the Court of Appeals will grant sellers a broad immunity from Sherman Act section 1 requirements. The Court apparently was trying to draw its rules narrowly so that, in theory, disruption of the Sherman Act would be minimal. However, as a practical matter, this goal is illusory. These rules would provide an easy source of immunity for any reasonably foresighted sellers who wished to stabilize prices through an information exchange agreement yet avoid Sherman Act liability. Future price manipulators will have little trouble circumventing these rules.

Rule 1 requires sellers to exchange price information solely to build a Robinson-Patman Act defense. Future sellers agreeing to exchange prices need only do what respondents have done here: establish some evidence that they were thinking of the Robinson-Patman Act, without regard to any real Robinson-Patman problem, whenever they verify a price with competitors. At the same time, they can in reality achieve a stabilization of prices.

Rule 2 requires sellers first to resort to all other reasonable means of corroboration. Sellers' ability to find such means of corroboration will vary directly with their incentive to do so. If competitors are not allowed to swap prices with one another, so that other corroboration is necessary

to establish a Robinson-Patman section 2(b) defense and to assess the competition, sellers can be quite ingenious in finding such corroboration. If, instead, sellers know that the failure to find corroboration provides them with an excuse for violating the Sherman Act, as the Court of Appeals' rules would allow, they can scarcely be expected to seek corroboration vigorously.

Rule 3 requires the sellers to have a good, independent reason to doubt the buyers' truthfulness. If the seller is highly motivated to find such a reason—if, for example, finding such a reason gives it an excuse to violate the Sherman Act—it surely will find one, as respondents did here. In the present case, the respondents claim that purchasers are "notoriously unreliable." *United States v. United States Gypsum Co., supra,* 550 F.2d at 121.

Under Rule 4, the communication with competitors must be strictly limited to the one price and one buyer at issue. In fact, this is no restriction at all, because this is just the sort of information exchange that violated the Sherman Act in the present case and in *Container Corporation, supra,* 393 U.S. 333. Moreover, the restriction is unenforceable. Once telephone contact has been established between competitors, there is no way to control what is said and there is no limit to the information that might be exchanged.

B. THE RULES FOR PRICE VERIFICATION ESTABLISHED BY THE COURT OF APPEALS WILL SERIOUSLY COMPLICATE COMPLIANCE AND LITIGATION.

The Court of Appeals has established rules that would be very difficult to apply for a seller who actually wished to comply with them. Before contacting a competitor, a seller would have to determine whether the sale would violate the Robinson-Patman Act, what are the "reasonable

means of corroboration" to which it must resort, and whether it has good, independent reason for doubting the buyer's truthfulness.

Moreover, Sherman Act litigation in these circumstances will become much more complex. After deciding the usual questions of liability, a court must determine whether the otherwise illegal conduct fits within the narrow subjective standard of this new exception, and whether the seller had a bona fide Robinson-Patman problem for which it needed to build a defense. See *Bruce's Juices, Inc. v. American Can Co., supra,* 330 U.S. at 745. The latter requirement means that Sherman Act trials will necessarily have to become Robinson-Patman trials as well.

The rules laid down by the previous cases outline a far more workable solution. If a seller feels a discriminatory sale will entail Robinson-Patman problems, it should make all reasonable legitimate efforts to verify a buyer's price claim. *Federal Trade Commission v. A. E. Staley Mfg. Co., supra,* 324 U.S. 746; *Viviano Macaroni Co. v. Federal Trade Commission, supra,* 411 F.2d 255. However, in so doing, the seller should not enter into an agreement to exchange price information with its competitors. *United States v. Container Corp. of America, supra,* 393 U.S. 333.

CONCLUSION

An agreement among competitors to exchange price information, with resulting stabilization of prices, represents a serious violation of Sherman Act section 1. Such conduct cannot be justified by a claim that the sellers were attempting to perfect a defense under Robinson-Patman Act section 2(b). The Robinson-Patman Act, a procompetitive statute, should not be construed to carve an anticompetitive exception out of the Sherman Act. Section 2(b), as the

courts have interpreted it, does not require sellers to contact their competitors. The decision below shows no indication that the sellers were actually violating the Robinson-Patman Act, so no need for a Section 2(b) defense was demonstrated. The effort of the Court of Appeals below to construct a Robinson-Patman exception to the Sherman Act shows that such an attempt results in impractical rules of conduct, easily evaded by sellers wishing to violate the Sherman Act.

The decision of the Court of Appeals should be reversed.

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